Executive accountability and national security

Article (Published Version)

THE MODERN LAW REVIEW
Modern Law Review
DOI: 10.1111/1468-2230.12624

Executive Accountability and National Security

Lorna Woods OBE, Lawrence McNamara and Judith Townend*

The protection of national security has traditionally been an exception to general norms of public accountability, based on prerogative powers. The last three decades have seen efforts to bring national security closer to the normal constitutional control mechanisms of parliament and the courts. The design of and changes to mechanisms of accountability have, however, been accepted without discussion of the often narrower purposes for which they were first established (most notably for oversight of surveillance), the extent of their departure from constitutional principles, or their impact in embedding new forms of exceptionalism in the constitutional framework. This article critically assesses these developments, prompted for example by the Law Commission's recommendations to reform official secrets laws, which adopted trusted intermediary and indirect accountability models without full consideration of historical and contemporary concerns or the exceptionalism on which they were based. Though focused on the UK, our account provides a cautionary tale for national security law reform in any modern democracy.

INTRODUCTION

The British constitution is based on the accountability of the executive to parliament with an independent judiciary ensuring compliance with the law. Traditionally an exception to these general norms of public accountability, the protection of national security constitutes an area where information flows are tightly controlled and the executive can act without approval of the legislature and where judicial intervention will be rare and limited. Secrecy has been demanded to protect the national interest, though this and national security are terms which can cover a range of interests and arise in many different contexts.

From the late 1980's there have been moves to bring national security matters closer to the normal constitutional control mechanisms of parliament and the courts, changes vital and valuable for a modern democracy in which the executive is accountable for its actions. Nevertheless, by no means did the underpinning of the security and intelligence agencies (SIAs) by statute and the introduction of external oversight constitute a golden age of transparency and responsibility.[1] Given the sensitive nature of national security, the shift towards

*Respectively, Professor of Internet Law, University of Essex; Reader in Law, University of York; Senior Lecturer in Media & Information Law, University of Sussex. The authors are grateful to numerous people for the comments we received on drafts at various stages, including Simon Halliday, Jenny Steele, Pablo Iglesias-Rodriguez and the three anonymous reviewers for this journal. We would also like to thank our colleagues at the Information Law & Policy Centre at IALS, which provided the forum for our early discussions of the ideas in this article.

1 Shortcomings had long been identified; for example HC Deb vol 222 cols 131-138 29 March 1993; HC Deb vol 222 col 940 15 April 1993.

ordinary standards and processes has inevitably been incomplete. Indeed, concerns about the need to counter terrorism have given rise to state calls for further powers, especially in the light of technological developments, and a reassertion of the need to keep these capabilities and their deployment secret in the service of national security. This process has seen measures and models put in place seeking to balance the competing imperatives. These are different from, if not inconsistent with, the usual mechanisms to ensure governmental accountability, which ordinarily require considerable openness and transparency.[2] Many of these measures, as they have emerged, have been subject to criticism.[3] What is lacking in the existing scholarship is a focus on the ways that, as the law has been reformed, changes in the mechanisms of accountability on the basis of the exceptional nature of national security have been accepted and replicated, the circumstances in which they are used expanded, and, taken together, the consequences for the constitutional settlement. It is only as time has passed that the full extent of this has become apparent.

This article argues that there has been an increase in oversight and transparency measures that rely on 'trusted intermediaries' in the area of national security, establishing a model that is repeatedly redeployed and normalised. While re-using existing approaches may seem uncontroversial, even sensible, our concerns arise because those developments become treated as unproblematic once adopted and then used as a model going forward in wider contexts. The focus

2 Cabinet Office, *Ministerial Code* (August 2019), paras [1.3] and [1.7] at https://www.gov.uk/government/publications/ministerial-code. All URLs last visited 11 August 2020 unless otherwise noted.

3 For example on the role of the judiciary, including special advocates and closed material procedures: D. Feldman, 'Human Rights, Terrorism and Risk: The Role of Politicians and Judges' [2006] *Public Law* 364; J. Ip, 'The Rise and Spread of the Special Advocate' [2008] *Public Law* 717; G. van Harten, 'Weaknesses of adjudication in the face of secret evidence' (2009) 13 *International Journal of Evidence and Proof* 1; A. Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) 73 MLR 836; A. Tomkins, 'Justice and Security in the United Kingdom' (2014) 47 *Israel Law Review* 305; C. Walker and G. Lennon (eds), *Routledge Handbook of Law and Terrorism* (London & New York, NY: Routledge, 2015) esp ch 8, B. Dickson, 'Terrorism and Legal Accountability' and ch 18, D. Jenkins, 'The Handling and Disclosure of Sensitive Intelligence: Closed Material Procedures and Constitutional Change in the Five Eyes Nations'; M. Chamberlain QC, 'Special Advocates and *Amici Curiae* in National Security Proceedings in the United Kingdom' (2018) 68 *University of Toronto Law Journal* 496; L. Graham, 'Statutory secret trials: the judicial approach to closed material procedures under the Justice and Security Act 2013' (2019) 38 *Civil Justice Quarterly* 189. On review mechanisms: D. Anderson, 'The Independent Review of Terrorism Laws' [2014] *Public Law* 403; J. Blackbourn, 'Evaluating the Independent Reviewer of Terrorism Legislation' (2014) 67 *Parliamentary Affairs* 955; K. Roach and C. Forcese, 'Bridging the National Security Accountability Gap: A Three-Part System to Modernize Canada's Inadequate Review of National Security' Ottawa Faculty of Law Working Paper 2016-05, 31 March 2016. On oversight of the intelligence agencies: J. Ip, 'Terrorism laws and constitutional accountability' in Walker and Lennon, *ibid*, 99; S. McKay and J. Moran, 'Surveillance Powers and the Generation of Intelligence within the law' in Walker and Lennon, this note, above, 133; T. Hickman and A. Tomkins, 'National security law and the creep of secrecy: a transatlantic tale' in L. Lazarus, C. McCrudden and N. Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (London: Hart, 2014). The most notable recent attempt to bring these together has been P. Scott, *The National Security Constitution* (London: Hart, 2018). Scott's thematic choices are citizenship, justiciability, secrecy and sovereignty. See also P. Scott, 'Hybrid institutions in the national security constitution: the case of the Commissioners' (2019) 39 *Legal Studies* 432.

on the benefits of using an intermediary has over-shadowed the design constraints within which those intermediaries operate, and the limited extent to which there is either accountability or transparency. The deployment of the trusted intermediary model has had significant consequences, most notably a lack of accountability to parliament, a limitation of transparency in the courts (open justice) and a troubling re-shaping of the judicial role and function under the constitution.

This discussion might have been prompted by any number of developments in recent years. For example, the Snowden disclosures paved the way for a new tranche of cases dealing with mass surveillance before both the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) and which resulted in the enactment of the Investigatory Powers Act 2016 (IPA 2016).[4] These cases build on earlier jurisprudence on covert surveillance which themselves may have affected the approach to SIAs.[5] While not expressly linked to Snowden, we also note the consultation paper published by the Law Commission of England and Wales in 2017 which reviewed the law relating to official secrets.[6] It was striking because it was expressly premised on earlier developments in the area of national security. Crucially, those developments primarily related to the oversight of surveillance, but the Law Commission applied them to the wider management and protection of national security, both in the consultation paper and in the subsequent much-delayed 2020 report.[7] While the consultation process led to a report that acknowledged some of the problems with the original proposals, and had the effect of mitigating some of the more deleterious possibilities, the Commission did not ultimately engage with the deeper concerns we raise here. The issues and challenges are not purely historic; Brexit, the pandemic, concerns about foreign electoral interference and advances in facial recognition technology have demonstrated that major challenges will continue to arise with the consequent temptation to deploy these models again.

We approach our inquiry by examining oversight in different institutions: parliamentary oversight, including through the Intelligence and Security Committee (the second part of this article); judicial oversight through the courts (the third part); and oversight by judicial commissioners, which has blurred the boundaries between regulatory and judicial oversight (the fourth part). This

4 For example Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* v *Minister for Communications, Marine and Natural Resources et al* ECLI: EU:C:2014:238; Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB* v *Post- och telestyrelsen* and *Secretary of State for the Home Department* v *Tom Watson and Others*, ECLI:EU:C:2016:970; *Big Brother Watch* v *UK (*Appl 58170/13, 62322/14), judgment 13 September 2018 (this judgment has been referred to the Grand Chamber).

5 For example *Malone* v *UK* [1984] ECHR 10 (*Malone*); *Halford* v *UK* [1997] ECHR 32. Principles relating to oversight and approval are also found in the wider European context: for example Fundamental Rights Agency, *Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU, Vol 1: Member States' legal frameworks* (Vienna: European Union Agency for Fundamental Rights, 2017).

6 Law Commission of England and Wales, *Protection of Official Data: A Consultation Paper* Consultation Paper No 230 (2017) (Law Commission, *Consultation Paper).*

7 Law Commission of England and Wales, *Protection of Official Data* Report No 395 (2020) (Law Commission Report).

approach recognises that there is no single chronological, institutional or substantive starting point, and that each is distinct but inter-connects with the others. In each part, we demonstrate how a model has been developed and re-used even though these mechanisms might be flawed, and the implications of these changes for executive accountability. The conclusion draws these threads together and presents some of the most significant implications that follow from them.

Paying attention to these developments reveals how uncritical re-use of special measures and models undermines the modern constitutional imperative of executive accountability – the public interest in knowing that the government is acting legally, ethically and consistently with the will and authority of parliament, in national security as in any other area. We show that a degree of accountability can be achieved without general transparency, at least in specific instances, but a systemic absence of transparency cannot foster public confidence and poses risks that inadequate processes will persist and flaws remain hidden. Ultimately, we argue that the incremental and inter-related exceptionalism is suggestive not merely of flawed and limited accountability mechanisms but also of unacknowledged distinctions between transparency and accountability, and a deeper, unspoken re-shaping of contemporary constitutional functions and powers.

PARLIAMENTARY OVERSIGHT

A core function of parliament is to hold the government to account;[8] ministers are responsible to parliament for their departments' actions.[9] An essential element of this accountability is the flow of information, underpinned by the obligation on ministers to be truthful and as open as possible towards parliament (and the public).[10] Yet, while the SIAs were put on a statutory footing by the Intelligence Services Act 1994 (ISA 1994) in an attempt to increase openness and institute 'proper arrangements for accountability',[11] substantial exceptionalism to the usual principles of parliamentary accountability in national security remains.

A particular concern is the information advantage ministers (and sometimes the Prime Minister) have over the rest of the legislature as these 'arrangements for accountability' often give the executive the right to control the release of information about the SIAs' activities. Where oversight powers are positioned within the executive, and oversight findings are closely held by it, there is a risk that state failures will not be adequately revealed or addressed. This weakness

8 M. Rush, *Parliament Today* (Manchester: Manchester University Press, 2005) 3; HC Political and Constitutional Reform Committee, *Role and Powers of the Prime Minister* HC 351 (2014) para [52].

9 Resolution on Ministerial Responsibility, HC Deb vol 292 col 1046-1047 19 March 1997; *Ministerial Code* n 2 above para [1.3(b)]. R. Brazier, *Ministers of the Crown* (Oxford: Clarendon Press, 1997) 261-270.

10 In addition to general obligations, see for example *Ministerial Code*, *ibid* paras [1.3(d)], [9.1].

11 HC Deb vol 238 col 153 22 February 1994.

may undermine the ability of the legislature to assess or report on the working of the system itself, in essence undermining the ability of parliament to hold the executive to account.

Starting with section 94 of the Telecommunications Act 1984 and moving on to the reporting mechanisms in the Interception of Communications Act 1985 (IoCA 1985), ISA 1994, the Regulation of Investigatory Powers Act 2000 (RIPA 2000), and IPA 2016, we demonstrate both the executive control over information made available to parliament and the risks of executive self-oversight mechanisms subverting and limiting the effectiveness of parliamentary control. Consideration of the reporting mechanism's effectiveness, and the extent to which problems in its operation have been recognised and addressed, is needed, yet debate has been sparse and for many years key information has not been forthcoming.

We begin with section 94, even though now repealed, because concerns arising from its operation – and specifically the impact of unrestricted executive control over information – have not been sufficiently considered. The exceptions in the reporting mechanism can be seen now as problematic yet a similar executive power over information flows arises in the models found in subsequent statutes. In successive reforms, including the IPA 2016, information asymmetry remains. When future proposals suggest reliance on oversight provisions where the executive has control over what is reported to parliament these deficiencies and especially the lessons of section 94 should be addressed.

Intertwined with this is the development since the Telecommunications Act of a particular model for balancing national security secrecy interests with accountability – the indirect accountability model – on which there is increasing reliance. Rather than permit parliament direct access to information about SIAs' activities, this model permits a trusted intermediary some access to operating information and the intermediary then reports to parliament. This indirect form of accountability substitutes the principle of general transparency with a principle of transparency to the trusted few. Transparency is in issue at two stages: between the executive (including SIAs) and trusted intermediaries; and between trusted intermediaries and parliament (or the general public). There are constraints on both steps, but those at the second step in particular have tended to be overlooked, and the consequent impact upon parliament's ability to hold the executive to account has not been fully considered.

Reporting by the Secretary of State

Section 94 of the Telecommunications Act 1984 needs some explanation because the provision and its workings have been somewhat obscure. Section 94 empowered the Secretary of State to make 'directions of a general character' to any person in the interests of national security or international relations, which could include a requirement that the person not disclose the existence or content of those directions.[12] Although section 94 was amended in 2003 by the

12 Telecommunications Act 1984, s 94(1), (5).

introduction of a test of necessity and proportionality, it remained a broadly drafted power.[13] Moreover, while the Secretary of State was required to 'lay before Parliament a copy of every direction given', under section 94(4) the Secretary of State was excused from so doing if he was 'of the opinion that disclosure of the direction is against the interests of national security or relations with the government of a country or territory outside the United Kingdom, the commercial interests of any person'.

Arguably, section 94 was a product of its time, enacted when national security was generally still seen as a matter of prerogative power or a category of information that government was simply entitled to keep secret;[14] the jurisprudence from the ECtHR on surveillance was in its infancy.[15] Nonetheless, concerns were expressed. One MP observed: 'the Secretary of State decides in secret to give secret instructions to the Director General, who … is not allowed to reveal those directions. This is a massive power to the Secretary of State and … will be operating in total secrecy without any accountability to the House of Commons. That is totally and utterly wrong in any sort of democracy.'[16]

The deployment of this exception eviscerated parliamentary oversight. Its use depended on the individual understanding of the Secretary of State, and the Act did not require the opinion to be reasonable or proportionate or take into account any particular factors; seemingly it could be used even beyond national security.[17] Moreover, this evisceration was persistently hidden. When the statute was amended in 2003 (in light of the Human Rights Act 1998), the extent and nature of the use of section 94 directions was not mentioned by ministers. In 2012 the Joint Committee on the Draft Communications Data Bill could find no information about section 94 directions, even though it sought it.[18] In 2014, the Home Affairs Select Committee noted that 'there is no public disclosure of how this is used ….'[19] Similarly, although there was a potential overlap with the RIPA 2000 regime, the use of section 94 directions for bulk data collection does not appear to have been disclosed by ministers until March 2015.[20] No section 94 directions were ever laid before parliament, which suggests that the section 94(4) exception was used in all instances.

With scrutiny limited,[21] oversight of the executive was for many years carried out by the executive itself. As the Interception of Communications Commissioner (IoCC) subsequently noted, effectively the whole process was

13 Telecommunications Act 1984, s 94(2A), as amended by the Communications Act 2003.
14 HL Deb vol 449 col 1161 20 March 1984 (Lord Mackay of Clashfern).
15 *Malone* v *UK* n 5 above.
16 HC Deb vol 33 col 89 29 November 1982 (Bob Cryer MP).
17 Intelligence Services Act 1994, s 3(2)(c); *Privacy International* v *Secretary of States for Foreign and Commonwealth Affairs and Ors* [2018] UKIPTrib IPT 15_110_CH (23 July 2018) at [73]-[77].
18 *Report of the Joint Committee on the Draft Communications Data Bill* HL 79 HC 479 (2012) para [2].
19 Home Affairs Select Committee, *Report on Regulation of Investigatory Powers Act 2000* HC 711 (2014) para [15].
20 This is implicit from the arguments put forward in *Privacy International* v *Secretary of States for Foreign and Commonwealth Affairs and Ors* [2016] UKIPTrib 15_110-CH (17 October 2016) at [13].
21 This problem was recognised in D. Anderson QC, *A Question of Trust: Report of the Investigatory Powers Review* (June 2015) para [13.31], albeit in the context of RIPA 2000, Part 1.

secret.[22] The lack of oversight and the fact that decisions were in practice unlikely to be challenged facilitated the broad interpretation the executive gave the powers in section 94. An expansion in quantity and type of surveillance techniques was thus enabled without the executive needing to disclose that expansion to parliament. This is an important lesson about the dangers of giving unbounded control over information flows to the Executive, but a lesson that has not been learned as the constraints imposed on the oversight Commissioners illustrate.

Reporting by a Commissioner

The year after section 94 was enacted, the UK, in response to the *Malone* case, legislated to put surveillance by means of interception of communications on a statutory footing; the issue of accountability was debated but extension beyond the traditional techniques of ministerial accountability rejected.[23] The Interception of Communications Act 1985 did, however, introduce an oversight body: the Interception of Communications Commissioner (IoCC) whose role was 'to keep under review the carrying out by the Secretary of State of the functions' under the IoCA 1985.[24] The IoCC was granted powers to request information, though he had no powers to compel change. Though the effectiveness of those information gathering powers was questioned,[25] by 2016 it was said that the IoCC's office was 'given access without reservation not only to all the material they requested but to the Agencies' own systems and to the processes of the warrant granting department'.[26] Significantly for transparency and consequently also accountability, IoCA 1985 required the IoCC to publish a report on his activities, though the impact of the reports depended on the scrutiny given to them. The Security Service Act 1989 (SSA 1989) and ISA 1994 each instituted another commissioner, with similar roles in relation to the operations of SIAs in general.[27] At this stage the effectiveness of this mechanism was questioned but dismissed on the basis that there was no evidence it did not work.[28] The surveillance regime was updated again by RIPA 2000, including the provisions related to the commissioners. When some sort of oversight regime following Snowden was brought in for section 94 directions, it was these regimes that were co-opted.[29] In each instance, the model was one of indirect accountability based on a trusted intermediary with oversight

22 *Half Yearly Report of the Interception of Communications Commissioner (Sir Anthony May)* HC 308 (16 July 2015) 13-14.
23 *Malone* n 5 above; HC Deb vol 77 col 298 15 April 1993.
24 Interception of Communications Act 1985, s 8.
25 See for example HC Deb vol 38 col 782 6 March 2000 (Anne Widdecombe MP); HC Deb vol 381 cols 793-794 6 March 2000 (Harry Cohen MP).
26 Anderson, n 21 above, para [6.102].
27 Security Service Act 1989, s 4; Intelligence Services Act 194, s 8.
28 HC Deb vol 238 col 157 (and more generally cols153-244) 22 February 1994 (Douglas Hurd MP).
29 The Intelligence Service Commissioner had been asked in 2010 to oversee on an extra-statutory basis the activities of GCHQ in relation to s 94 directions, but even the fact of that oversight was not made known until 2015 (*Report of the Intelligence Services Commissioner for 2015 (Sir Mark*

obligations, a model which originated in IoCA 1985, was replicated in the SSA 1989 and ISA 1994, and retained in RIPA 2000.

Although an improvement in oversight in relation to section 94, weakness existed. The commissioners' reports did not necessarily constitute full disclosure. First, since none of the section 94 directions were public it was difficult to discuss them publicly.[30] Secondly, and more generally, the commissioners had to report annually to the Prime Minister, who was to lay the report before parliament.[31] However, the commissioners could limit what was to be disclosed to parliament.[32] Additionally, showing information flow controls similar to section 94(4), the Prime Minister could exclude from the report certain content. Given the temporal proximity of section 94 and IoCA 1985, it may be that the ideas behind the one influenced thinking about the other. By the time RIPA 2000 was enacted the list of grounds on which content could be excluded comprised not just the types of content mentioned in the foregoing statutes (notably national security, detection or prevention of serious crime, and the economic well-being of the United Kingdom) but also 'the continued discharge of the functions of any public authority whose activities include activities that are subject to review by the Commissioner'.[33] Given the large number of public authorities which would fall within IoCC's purview, this was a broad exception not necessarily connected to national security. Some of the other objectives were phrased equally broadly but transplanted from earlier statutes into RIPA 2000. As with section 94(4), there is no requirement of reasonableness or proportionality. Moreover, while the commissioners were to be consulted on any redaction from the report and parliament had to be told if information had been redacted (admittedly a crucial difference from the position under section 94(4)), the final decision on content lay with the Prime Minister. There was no timescale for tabling the report, and no requirement that the Prime Minister justify or explain any decision to delay or exclude material.

The *de facto* deference to the executive under section 94(4) had, in a retrograde step, become a *de jure* deference under first IoCA 1985 and then its

Waller) HC 459 (8 September 2016)), 5. Responsibility was transferred to the IoCC in January 2015. *Report of the Interception of Communications Commissioner (Sir Anthony May)* HC 1113 (12 March 2015), section 10; *Half-yearly Report of the Interception of Communications Commissioner (Sir Anthony May)* n 22 above, section 4; *Report of the Interception of Communications Commissioner (Sir Stanley Burnton): Review of directions given under section 94 of the Telecommunications Act 1984*. Prior to 2015, the position was opaque. The IoCC had earlier provided '*limited* non-statutory oversight of [part of the safeguards relating to] one particular set of section 94 directions' (emphasis in original) and could say no more about that oversight: *Half-yearly Report of the Interception of Communications Commissioner (Sir Anthony May) ibid*, para [4.6]-[4.7]. However, it is clear that oversight arrangements were limited, partial, did not challenge the interpretation of s 94, and did not cover all s 94 directions: *Report of the Interception of Communications Commissioner (Sir Stanley Burnton): Review of directions given under section 94 of the Telecommunications Act 1984*, sections 4-5. See also Anderson, n 21 above, para [6.104] and the *Privacy International* litigation notes 17 and 20 above.

30 *Half-yearly Report of the Interception of Communications Commissioner (Sir Anthony May) ibid*, para [4.8].

31 RIPA 2000, s 58(4), (6).

32 This point was recognised in debates relating to the Intelligence Services Bill: HC Deb vol 238 col 153-244 22 February 1994.

33 RIPA 2000, s 58(7).

successors, including RIPA 2000. The lessons from section 94 – particularly regarding the breadth of the exception and the questions of who made the relevant determinations and on what basis – were not considered at RIPA 2000's enactment, nor since. It may be that section 94 was seen not to be relevant given that these were more general reporting obligations, taking place against a warrant-based system and relying on the effectiveness of indirect accountability. Alternatively, it could be that the use of section 94(4) and lack of oversight of section 94 were not recognised by the parliament precisely because of the secrecy and obscurity surrounding the provision, and they were not disclosed by the executive because section 94(4) provided the executive with total control over information flow.

This model has been replicated in other contexts, including policing and even beyond. In the Protection of Freedoms Act 2012 (PoFA 2012), two commissioners the Biometrics Commissioner (BC) and the Surveillance Camera Commissioner (SCC) were introduced to deal with retention of DNA by the police[34] and the over-use of CCTV[35] respectively. Accountability was achieved through the provision of reports to the Secretary of State and thence to parliament. Material could be redacted in the reports of the BC on broad grounds (including but not limited to national security)[36], raising the usual concerns about information flows. By contrast, the SCC appears as an aberration because there is not (as yet) an equivalent restriction in respect of the SCC's reports, but the terrain covered by the SCC is much broader than that of the oversight commissioners, covering not just public bodies but also the use of surveillance cameras by private actors. Currently the Government is seeking to consolidate the two commissioners into one appointment.[37]

The model of indirect accountability developed from IoCA 1985 through to RIPA 2000 was again re-deployed when the surveillance regime was reconstructed through the IPA 2016. The UK government claimed that the IPA 2016 introduced a 'world leading oversight regime'[38] but, while it may well have introduced some significant safeguards controlling the use of surveillance powers, the extent to which it ensures executive accountability to parliament is questionable. As before, a key mechanism for such accountability is the annual report of the Investigatory Powers Commissioner (the replacement for all commissioners under previous acts) under section 234 of IPA 2016 on the carrying out of the functions of the Judicial Commissioners, who review executive decisions to issue warrants. Despite the concerns about its predecessors,[39] the IPA 2016 still allows for self-censorship and reports are still subject to executive control. The IPC reports to the Prime Minister alone (despite attempts in Public Bill Committee to change the reporting obligation to parliament). The Prime Minister must publish the report and lay it before parliament, but

34 Protection of Freedoms Act 2012, s 20.
35 Protection of Freedoms Act 2012, s 34.
36 Protection of Freedoms Act 2012, s 21(5).
37 Commissioner for the Retention and Use of Biometric Material, Annual Report 2019, iii.
38 Home Secretary, Amber Rudd MP, 'Investigatory Powers Commissioner establishes oversight regime' 1 September 2017 at https://www.gov.uk/government/news/investigatory-powers-commissioner-establishes-oversight-regime.
39 Anderson, n 21 above, paras [6.103] - [6.104], [12.79] et seq.

can exclude matter on the same broad grounds as under RIPA 2000.[40] The Minister of State for Defence stated that any redaction would be made only on national security grounds.[41] If this is the case, then the other grounds should be repealed.

The IPC's first report provided coverage and scrutiny of numerous matters, including errors made in the exercise of powers.[42] It was, however, opaque about the reasoning and standards for decisions about whether errors were serious enough to require a person to be notified and when national security would preclude notification. In its 2018 Report, the perceived need to suppress information is evident; the IPC, for example, reports being unable to supply how many times the Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees was followed because of the 'sensitivity' of the topic.[43] Control of information apparently stays within the hold of the executive.

In sum, the replication of earlier flaws of RIPA 2000 is apparent. Despite Anderson's praise for the IoCC's reports there are still, as he also noted, constraints on transparency.[44] It might be argued that the worst excesses of section 94(4) secrecy have been avoided as the fact of redaction is visible, but this still leaves parliament at an information disadvantage vis-a-vis the executive.

The Law Commission in its consultation paper viewed the IPA 2016 as a good model, referring to the IPC as a template for a statutory commissioner to receive concerns and complaints from members of the security services about the way those services are operating.[45] The Commission observed that the annual reporting obligation 'would potentially include details of any investigation'[46] but did not consider the fact that historically these reports have not gone into details of particular operations. In its subsequent report, the Commission maintained its view that a statutory commissioner should be used and that the IPCO framework was an appropriate model.[47] It acknowledged however concerns about whistle blowers and freedom of expression (which it had not addressed in its consultation paper).[48] Rightly, the Commission saw as problematic the options of reporting on whistleblower complaints to the Prime Minister or to the Intelligence and Security Committee (discussed below) because that could lead to a public perception that the process is 'internal' not 'external'.[49]

40 Investigatory Powers Act 2016, s 234(7).
41 HL Deb vol 774 col 630 19 July 2016.
42 Investigatory Powers Commissioner's Office, *Annual Report 2017* HC 1780 (31 January 2019).
43 Investigatory Powers Commissioner's Office, *Annual Report 2018* HC 67 (5 March 2020), 62.
44 Anderson, n 21 above, para [6.103].
45 Law Commission, *Consultation Paper* n 6 above, para [7.103] et seq.
46 *ibid* para [7.115].
47 Law Commission Report n 7 above, para [10.9].
48 *Goodwin* v *United Kingdom* (1996) 22 EHRR 123; *Financial Times Ltd and Others* v *the United Kingdom* (2010) 50 EHRR 46; *Sanoma Uitgevers BV* v *Netherlands* (2010) 30 BHRC 318; *Becker* v *Norway* [2017] ECHR 834. See L. Woods, L. McNamara and J. Townend, 'Law Commission Consultation on the Protection of Official Data (CP 230): Response' at https://infolawcentre.blogs.sas.ac.uk/files/2017/06/Law-Commission-Consultation-on-the-Protection-of-Official-Information-Woods-McNamara-Townend-09062017-final-online.pdf.
49 Law Commission Report n 7 above, para [10.36](3).

However, the Commission does not identify core problems that underpin the oversight system as a whole as regards executive control over information flows. Moreover, there was no critical consideration of whether a model designed to back up a warrant system is suitable for co-opting to a broader context and different purposes (criticisms seemingly being more practically focussed), though the BC and SCC may in any event be precedent for this.[50]

Reporting by the Intelligence and Security Committee of Parliament

A further avenue of parliamentary oversight of the SIAs was introduced through the ISC, established under the ISA 1994. This was a development from the existing regimes then in place under the IOCA 1985 and the SSA 1989 and seemingly arose from a concern expressed in parliament about the effectiveness of a model based on reporting to a minister. Despite this, we question the degree to which the ISC counters executive control over information. It is another example of the model of indirect accountability that relies on a trusted intermediary with the weaknesses in transparency and accountability outlined above.

The introduction of the ISC probably reflected a more general attitude that the SIAs – now creatures of statute – should be more open and accountable within the underlying constitutional framework. The ISC was established to 'examine or otherwise oversee the expenditure, administration, policy and operations' of MI5, MI6 and GCHQ.[51] In this, the ISC is a form of trusted intermediary. Yet, regardless of the ISC's views about the way powers have been exercised in any given circumstance, and any political effect it may have through embarrassment to or pressure on the government following a report, executive power cannot be limited or controlled by the ISC. There has been significant criticism of the ISC, specifically as regards its independence. It remains a *sui generis* committee rather than a standard parliamentary select committee and, under the statute, subject to a degree of Prime Ministerial control.[52] Moreover, its members often have held roles in the bodies they now oversee (for example ministers and, via appointment to the House of Lords, former senior officers in the agencies themselves) leading to concerns that the oversight body in practice becomes deferential to those agencies' assessments of legality, necessity and proportionality.[53] The Home Affairs Committee saw the system as weak, and ineffective, and that had 'an impact upon the credibility of the [SIAs']

50 Such concerns had some years earlier led the (then) government to reject the wider use of the Interception Commissioner when RIPA 2000 was being enacted: HL Deb vol 615 col 386 13 July 2000 (Lord Bach).

51 Justice and Security Act 2013, s 2.

52 Justice and Security Act 2013, s 1. More generally see H. Bocehl, A. Defty and J Kirkpatrick '"New Mechanisms of Independent Accountability": Select Committees and Parliamentary Scrutiny of the Intelligence Services' (2015) 68 *Parliamentary Affairs* 314; A. Defty, 'Coming in from the cold: bringing the Intelligence and Security Committee into Parliament' (2019) 34 *Intelligence and National Security* 22.

53 *A Democratic Licence to Operate: Report of the Independent Surveillance Review* RUSI Whitehall Report 2-15 (July 2015), paras [4.101]-[4.102].

accountability, and … the credibility of Parliament itself.'[54] That the ISC is unique in Parliament is, yet again, suggestive that exceptionalism should be acceptable where national security is concerned.

Nonetheless, the ISC has at times appeared willing to hold the executive and its agencies to account in a way that suggests the membership risks outlined above have been mitigated: its 2018 inquiry into extraordinary rendition was a landmark of scrutiny.[55] However, it is information that is key – both the ISC's access to information and its ability to make this information available through its reports – and in these regards the ISC faces significant hurdles both as regards access to information and in its ability to make its report public.

There are severe limitations on the ISC's ability to make agencies fully comply with the obligation to share information in a timely manner[56] and the Secretary of State can deny the committee access to sensitive material (comparable to the original limitations in section 94 and RIPA 2000).[57] It is noteworthy that the ISC seemingly only became aware of the use of section 94 as a result of the Snowden disclosures[58] and from its report on surveillance in the run up to the IPA,[59] it is unclear how much, if anything, the ISC was told about the use of section 94 directions. Since the ISC is already a limited, pre-approved group this limitation seems unnecessary and hobbles its effectiveness as a trusted intermediary. Although the ISC reports are now made to parliament – an improvement on the original position – they are supplied in advance to the Prime Minister.[60] The Prime Minister can require material to be excluded from any ISC report if, after consultation with the ISC, he is of the opinion it would be prejudicial to the ability of the SIAs to discharge their functions.[61] For example, in *Privacy*

54 Home Affairs Select Committee, *Counter-Terrorism* HC 231 (30 April 2014), para [157] and Annex B [26] et seq. See also Lord MacDonald, 'Proper Parliamentary Oversight of the Security Services is Desperately Needed' FA Mann Lecture, December 2013 at http://www.democraticaudit.com/wp-content/uploads/2013/12/FAMann-lecture2.pdf. The risk of intelligence powers being used for political purposes is widely recognised: see for example European Parliament, *Parliamentary Oversight of Security and Intelligence Agencies in the European Union* PE 453.207 (2011) 88-89.

55 Intelligence and Security Committee of Parliament *Detainee Mistreatment and Rendition: 2001-2010* HC 1113 (28 June 2018); Intelligence and Security Committee of Parliament, *Detainee Mistreatment and Rendition: Current Issues* HC 1114 (28 June 2018).

56 Intelligence and Security Committee of Parliament, *UK Lethal Drones Strikes in Syria* HC 1152 (26 April 2017); Intelligence and Security Committee of Parliament, *Annual Report 2016-17* HC 655 (20 December 2017) 105-106; Intelligence and Security Committee of Parliament *Detainee Mistreatment and Rendition: 2001-2010 ibid* para [236]; HL Deb vol 799 cols 81GC-83GC (Marquess of Lothian), 87GC (Lord Anderson of Ipswich), 95GC-97GC (Lord Paddick) 9 Sep 2019.

57 Justice and Security Act 2013, Sched 1, para 4.

58 John Hayes MP, answering written questions from David Davis MP, Electronic Surveillance: Written question – 16310, 16312, 16313, 13 November 2015 at https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-11-13/16310/.

59 Intelligence and Security Committee of Parliament, *Privacy and Security: A modern and transparent legal framework* HC 1075 (12 March 2015).

60 Justice and Security Act 2013, s 3(1), (7). Confidential reports may also be made directly to the Prime Minister.

61 Justice and Security Act 2013, s 3(4).

and Security: A modern and transparent legal framework, redaction occurred in the part of the report dealing with section 94.[62]

Further, there are no requirements on when reports must be published.[63] The risk that a publication could be delayed occurred in 2019 when the Prime Minister's office refused to publish an ISC report on Russian interference in UK elections; no reason was given despite its salience given the impending General Election.[64] It would be ten months until publication; with the legislation setting no deadline for the ISC to be established in a new parliament, the government – by not making ISC appointments – was effectively able to delay the publication of the Russia report and any new scrutiny.[65] Where the ISC makes reports other than its annual report there is no requirement that the ISC lay those reports before parliament. It is not clear whether the ISC needs to disclose the fact it has conducted any such inquiry or made any report to the Prime Minister. The 2013 JSA reforms made some improvements but it was a lost opportunity to strengthen oversight. Concerns raised at the time of reform were seemingly overridden by traditional concerns about the need for secrecy, just as they were at the time the ISC was introduced.[66]

The ISC gained a power in the IPA: it can request an investigation by the IPC.[67] This power is, however, of limited effect because, again, an investigation would only become public if included in ISC or IPC reports to parliament. There was no recognition of the fact that executive control over information that will be provided to the ISC could adversely affect the ability of parliament to hold the executive to account.

The effectiveness and limits of parliamentary oversight

Overall we see a picture of national security oversight where traditional prerogative exceptionalism has been replaced by a model of statutory exceptionalism that uses indirect or even private approaches to accountability with its reliance on a trusted intermediary (whether in the form of a commissioner's report or that of the ISC). It entrenches executive control over information flows. Parliamentary reporting requirements are weakened so substantially that their ability to achieve the accountability and oversight for which they were designed must be called into question, particularly in times of crisis. The models have become embedded, and largely taken for granted. The weaknesses of this model – demonstrated over time – are overlooked all too easily, or evidence is not

62 *Privacy and Security* n 59 above, 100. Redaction markings are explained in the preface to the report.

63 There is a Memorandum of Understanding between the ISC and the government about the speed of response; the government does not always comply – see for example Intelligence and Security Committee of Parliament, *Annual Report 2017-18* HC 1692 (22 November 2018) para [1].

64 HC Deb vol 667 col 647 5 November 2019 (Dominic Grieve QC MP); HL Deb vol 800 col 1097 19 November 2019 (Lord Anderson of Ipswich).

65 Intelligence and Security Committee of Parliament, *Russia* HC 632 (21 July 2020).

66 See for example Intelligence Services Bill [Lords], 2nd Reading, HC Deb vol 238 col 153-244 22 February 1994, especially the concerns raised by Jack Cunningham MP, col 165 et seq.

67 Investigatory Powers Act 2016, s 236.

available to support concerns. While the IPA 2016 overcame some weaknesses in the oversight regime for SIAs, it did not address those that have long been evident in the mechanisms that should provide for executive accountability to parliament; the position of the ISC has not been revisited. The fact that the Law Commission, while it accepts the importance of some form of disclosure in relation to whistleblowing investigations (and even accepts a public interest defence to criminal liability), does not engage with these weaknesses and underlying executive control illustrates the point. When existing structures have been adopted, as for example with regards to PoFA 2012, it also risks a repetition of these weaknesses and their expansion into areas not inherently connected with surveillance. This acceptance may be understandable, but not justifiable, given that similar special treatment characterises other institutions that hold the executive to account. Exceptionalism is also found in the courts, where oversight mechanisms are taken forward even though past experience should call for caution.

OVERSIGHT IN THE COURTS

The courts, with an independent judiciary, ensure the executive is acting lawfully and is accountable.[68] They provide redress where action has been unlawful and, through exposure during proceedings, shed light on acts of the state.[69] Even in the national security sphere, they provide oversight of executive power, even if this is not complete.[70] Yet pressure on open justice remains given the perceived need for secrecy in the field of national security.

When national security issues arise, two main mechanisms have emerged to manage them. One was the establishment of specialist tribunals, for example the Proscribed Organisations Appeal Commission (POAC),[71] the Special Immigration Appeals Commission (SIAC), and the Investigatory Powers Tribunal

68 For example *X Ltd* v *Morgan Grampian (Publishers Limited)* [1991] 1 AC 1, 48; *Duport Steel* v *Sirs* [1980] 1 WLR 142, 157; *R (on the application of UNISON)* v *Lord Chancellor* [2017] UKSC 51 at [68] *per* Lord Reed; Lord Neuberger, Lord Mance, Lord Kerr, Lord Wilson and Lord Hughes agreeing; *R (on the application of Miller)* v *The Prime Minister* [2019] UKSC 41 at [46]-[47]; Constitutional Reform Act 2005, s 3.

69 For example much of what we know about the operation of s 94 has emerged in court proceedings; *Privacy International* v *Secretary of State for Foreign & Commonwealth Affairs and Ors* n 17 above, esp at [6]; *Report of the Interception of Communications Commissioner (Sir Stanley Burnton): Review of directions given under section 94 of the Telecommunications Act 1984* HC 33 (7 July 2016) para [8.17].

70 *R* v *Secretary of State for Foreign & Commonwealth, ex parte Bancoult (No 2)* [2008] UKHL 61; *R (Abbasi)* v *Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598; *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 37 (the GCHQ case); T. Poole, 'United Kingdom: The royal prerogative' (2010) 8 I.Con 146; A. Tomkins 'Defining and Delimiting National Security' (2002) 118 LQR 200, 202-203; *Mohamed, R (on the application of)* v *Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65 at [44] *per* Judge LCJ; at [129], [131]-[135], [154], [189]-[191] *per* Neuberger MR; at [208], [262], [285], [290], [295] *per* May PQBD; Lord Kerr, '"Only Parliament can do that"? The reliance of British jurisprudence on the common law in the national security context' [2015] *Civil Justice Quarterly* 244, 247.

71 Terrorism Act 2000, s 5; The Proscribed Organisations Appeal Commission (Procedure) Rules 2007, SI 2007/1286.

(IPT).[72] The other was reliance on special procedures, not just in the specialist tribunals but also in the ordinary courts. The impact each of these approaches has on individuals' rights, open justice and the flow of information varies, and their cumulative impact has not been considered.

The existence of specialist tribunals has, in providing a venue to decide issues that could not be dealt with by the ordinary courts, to some extent improved individuals' ability to scrutinise and challenge executive decisions. The IPT has been seen as part of the oversight mechanisms for the SIAs and therefore a step forward in accountability. Moreover, the establishment of SIAC allowed some individuals to seek judicial review of a Home Secretary's decision to deport them, albeit only in that specialist tribunal. Similarly, POAC hears challenges (under judicial review principles) to the refusal by the Secretary of State to remove an organisation from the list of proscribed organisations. From some tribunals (for example, POAC), appeal through the ordinary appellate courts is possible.[73] While RIPA 2000 originally sought to limit individuals' rights of access to the general courts,[74] the IPA introduced the possibility of appeal against the IPT's decisions.[75] Nonetheless, the existence of these tribunals still institutionalises the special treatment of executive action.

More worrying are special procedure mechanisms, which may be relied on in the ordinary courts as well as in specialist tribunals. Although possibly limiting the extent or effectiveness of judicial oversight, some special procedure mechanisms respect the constitutional benchmarks of equality of arms and open justice. Public interest immunity (PII), for example, allows the executive to withhold evidence in a dispute, but the executive cannot rely on that evidence and so equality of arms is not compromised; this may incentivise acceptance of open justice. Courts can hold hearings *in camera* or impose reporting restrictions, which may limit open justice, but only where necessary for the administration of justice or, sometimes, to protect national security. Recent changes, however, go to the heart of what constitutes a fair and open trial. We examine two instances: in civil proceedings (including administrative) through the use of closed material procedures; and in criminal proceedings through new approaches to limiting access to hearings. These show how a procedure developed in one context is re-deployed elsewhere. Moreover, as we detail below, the Law Commission proposals in relation to official secrets adopt these models for use in a new context without consideration of the extent to which retreats from fair trials and open justice have consequences for executive accountability.

72 The Employment Tribunal is a fourth example and warrants more detailed and critical attention than can be given in this article. In particular, in national security matters it is subject to Ministerial direction in ways that the others are not: The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2103/1237, reg 94.

73 Terrorism Act 2000, ss 5, 6.

74 RIPA 2000, s 67(8), however this was narrowly interpreted in *Privacy International* v *Investigatory Powers Tribunal* [2019] UKSC 22.

75 Investigatory Powers Act 2016, s 242 (inserting s 67A into RIPA 2000).

Civil and administrative proceedings: the rise of closed material procedures

Closed material procedures (CMPs) have emerged from processes designed to manage deportation on security grounds[76] which were found to be incompatible with the ECHR.[77] While developed for use in SIAC, CMPs are also available in POAC[78] and the IPT has procedures in place that parallel them.[79] Under CMPs, security sensitive information cannot be disclosed to applicants or their lawyers. Instead, a 'special advocate' is appointed to represent the applicant in a closed hearing. The special advocate sees all the information on which the state relies, but after seeing that information may not communicate with the applicant or the applicant's lawyers about the case.[80] This introduction of a 'trusted intermediary' into the process parallels that seen in the reporting mechanisms under ISA 1994, RIPA 2000 and IPA. CMPs were established to enhance rights protection; those subject to deportation were no longer vulnerable to executive control alone but would have an independent tribunal and informed legal representation, albeit representation with whom they had a different relationship.

The government has attempted to use CMPs in relation to security sensitive material in broader circumstances: to defend civil actions brought by returning Guantanamo Bay detainees alleging UK complicity in torture and rendition. The Supreme Court, however, held that the courts had no general power to permit CMPs. They were at odds with natural justice and open justice.[81] CMPs would only be available if statute permitted.[82] The government subsequently proposed legislation extending the use of CMPs to civil proceedings generally,[83] even though the deficiencies of CMPs as they operated in SIAC were on record. A special advocate commented that, 'the public should be left in absolutely no doubt that what is happening … has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system'.[84] However well motivated, representation in CMPs cannot

76 The background is well explained in HC Constitutional Affairs Committee, *The Operation of the Special Immigration Appeal Commission (SIAC) and the use of Special Advocates* HC 323-I (3 April 2005) esp ch 4. See also Chamberlain, n 3 above, 496-503.

77 *Chahal* v *United Kingdom* (1997) 23 EHRR 413; Constitutional Affairs Committee, *The Operation of the Special Immigration Appeal Commission ibid*.

78 The Proscribed Organisations Appeal Commission (Procedure) Rules 2007, SI 2007/1286.

79 The Investigatory Powers Tribunal Rules 2018 introduced (r 10(4)) a presumption towards open hearings where possible, confirming the approach the IPT had developed for itself; cf the Investigatory Powers Tribunal Rules 2000, r 9(6), that stated 'The Tribunal's proceedings, including any oral hearings, shall be conducted in private'.

80 Special Immigration Appeals Commission (Procedure) Rules 2003, as amended.

81 *Al Rawi* v *The Security Service and others* [2011] UKSC 34.

82 *ibid*, for example at [69] *per* Lord Dyson, at [71]-[74] *per* Lord Hope, at [86]-[87] *per* Lord Brown), at [95] *per* Lord Kerr.

83 Cabinet Office, *Justice and Security Green Paper* Cmd 8194 (2011) ch 2; the Justice and Security Bill was subsequently introduced in 2012.

84 Nicholas Blake QC (later Mr Justice Blake and, since retirement, a Judicial Commissioner under the IPA), evidence to the Joint Committee on Human Rights, cited in *Justice and Security Green Paper: Response to Consultation from Special Advocates* 16 December 2011, para [12] at http://webarchive.nationalarchives.gov.uk/20140911100308/http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/09_Special%20Advocates.pdf. Chamberlain, n 3 above, 505-508, looks at the concerns in some detail.

be as effective as representation in ordinary proceedings. Controversially, the effect of CMPs under the JSA proposals was not to safeguard rights but to diminish them. Nevertheless, the JSA was enacted, albeit with some safeguarding amendments. Its procedures were quickly deployed beyond the narrow range of cases for which it was ostensibly intended.[85] It seems that where a mechanism exists, it will be used (as was section 94(4) of the Telecommunications Act); a point which should be taken into account when considering amendments to the mechanism or its further redeployment.

The consequence of CMPs for accountability is complex. CMPs limit the extent to which the executive is accountable through the courts as far as equality of arms and openness are concerned. Conversely, judges may see material from the executive that might not otherwise come before judicial eyes. There is a conflict between accountability that is public and accountability that is not public, which has parallels with concerns about executive control over information flows. Both require extraordinary degrees of trust in the executive and judicial branches but the latter – non-public accountability – even if it could be effective, is difficult to assess because of the secrecy that shrouds it.

The contraction of open justice in criminal proceedings

Developments in the past few years are eroding commitments to open justice in criminal matters. *Guardian News and Media Ltd & Ors* v *R & Incedal*[86] (*Incedal* case), which concerns terrorism-related offences, represents a significant change in the acceptable management of criminal trials in the national security context. It offers further evidence of diminished state accountability, with insufficient regard to the public interest in open justice and an individual's right to a fair trial and is a dangerous precedent for case management more generally. The trial judge had imposed what was effectively total secrecy. This was overturned on appeal, but restrictive conditions were imposed: the only public proceedings would be the swearing in of the jury, the reading of charges, parts of the introductory remarks to the jury, parts of the prosecution's opening address, the verdicts, and perhaps some of the sentencing remarks. Everything else would be closed. In a novel arrangement, ten 'accredited journalists' were to be permitted to attend 'the bulk of the trial' and to take notes, which were not to be removed from the court. Reporting restrictions were imposed.[87] While not formalised in the way that the oversight mechanisms in ISA 1994, RIPA 2000 and IPA 2016 were, there is a similar preference for relying on a small group of trusted intermediaries who can only access and disseminate approved

85 Ministry of Justice, *Use of Closed Material Procedure Reports* at https://www.gov.uk/government/collections/use-of-closed-material-procedure-reports; L. McNamara and D. Lock, *Closed material procedures under the Justice and Security Act 2013: A review of the first report by the Secretary of State (with supplement)* (London: Bingham Centre for the Rule of Law, December 2014).

86 *Guardian News and Media Ltd & Ors* v *R & Incedal* [2016] EWCA Crim 11; *Guardian News & Media Ltd v Incedal & Bouhadjar* [2014] EWCA Crim 1861.

87 *Guardian News and Media Ltd* v *AB & CD*, [2014] EWCA Crim (B1) (12 June 2014) at [16], [19]; Dominic Casciani, 'Erol Incedal: The Trial We Couldn't Report' *BBC.co.uk* 26 March 2015 at https://www.bbc.com/news/uk-31989581.

information, reducing transparency. At the end of the case the media unsuccessfully applied for permission to report some detail from the closed part of the trial.[88] In the absence of accountability through open courts, the Court of Appeal suggested that 'public accountability' could be achieved by the ISC, but did not consider the limits on the ISC.[89]

The judgments reveal an ill-defined, *sui generis* approach with no statutory basis. The trial judge relied on 'ministerial certificates' from the Secretaries of State. Although not disclosed, the certificates were apparently similar to those used in PII but, from the way the Court of Appeal refers to the certificates underlying the *in camera* order, the mechanism is not the same as PII.[90] Under PII, if a fair trial requires disclosure of evidence the executive must choose between disclosure or withdrawing charges. This new process means that the prosecution would not have to choose between keeping material secret or bringing a prosecution; it will be able to do both.[91] There is no monitoring of when or how this new process has been used,[92] bringing to mind the total secrecy of section 94 and its consequences, nor is there any indication that media or civil society organisations will be notified if such arrangements are sought in future. This is particularly worrying given that the *Incedal* case reportedly came to public attention by chance.[93] Admittedly, in *Incedal* the complete blanket of secrecy was removed, but the substantive result and the procedure used to reach it are worrying. There is a new but opaque model for departing from open justice that, with the Court of Appeal's imprimatur, risks diminishing the transparent scrutiny of executive actions, has not been subject to parliamentary scrutiny, and has now emerged as the basis for law reforms.

The creeping influence of *Incedal* and CMPs

The Law Commission consultation paper treated the *Incedal* decision as an unproblematic precedent that provided an acceptable way of excluding the public from criminal proceedings; that view underpinned the Commission's proposals about the way that Official Secrets Act (OSA) offences should be tried. The

88 *Incedal* [2016] EWCA Crim 11, n 86 above.

89 *ibid* at [75]. For a non-terrorism national security case see *R (on the application of Wang Yam) (Appellant)* v *Central Criminal Court and another (Respondents)* [2015] UKSC 76 (*Wang Yam*); on appeal from [2014] EWHC 3558 (Admin); *Yam* v *United Kingdom* (2020) ECHR 31295/11; [2020] All ER (D) 55 (Jan).

90 P. Scott, 'An inherent jurisdiction to protect the public interest: from PII to "secret trials"' (2016) 27 *King's Law Journal* 259, 265-266.

91 *ibid*, 271.

92 The courts in England and Wales have recently established a library of closed judgments: 'Practice Direction: Closed Judgments' 14 January 2019 at https://www.judiciary.uk/announcements/practice-direction-closed-judgments/. Its scope, however, is very unclear: L. McNamara, 'Closed judgments: security, accountability and court processes' UK Human Rights Blog, 25 January 2019 at https://ukhumanrightsblog.com/2019/01/25/closed-judgments-security-accountability-and-court-processes/.

93 H. Irving and J. Townend, 'Censorship and National Security: Information Control in the Second World War and Present Day' [2016] *History & Policy* at http://www.historyandpolicy.org/index.php/policy-papers/papers/censorship-and-national-security-information-control.

Commission suggested reforming section 8(4) of the OSA 1920, which empowers a court to hear a case entirely in private except for passing of sentence, removing that draconian power but retaining the option of complete secrecy that, given *Incedal*, it clearly saw as an entirely tenable option. It proposed excluding the public only if it is 'necessary to ensure national safety … is not prejudiced'.[94] The report subsequently put a gloss on that, recommending exclusion only if it 'must be necessary for the administration of justice having regard to the risk to national safety'.[95] While a necessity test would be an improvement on the existing model, the proposed change would still fall well short of what is required to ensure scrutiny of the executive. In particular, 'national safety' was undefined, rendering the provision vulnerable to broad interpretation, if not abuse, as demonstrated by the interpretation of a similar phrase in section 94(4) of the Telecommunications Act. Crucially, the Commission did not in its consultation paper or report consider the absence of a statutory basis for the *Incedal* approach. Significantly, the Commission did not step back from its consultation view that accepted unquestioningly the Court of Appeal's position that the ISC provides an adequate path for executive accountability; as we have argued above, that position is unconvincing.

In both the consultation and report the Commission observed the contrast between the development of approaches in criminal and civil proceedings, noting that the JSA provides for CMPs in the latter. The Commission stated that its 'aim is not to suggest that the procedure that is applicable in the civil context ought to be imported wholesale into the criminal'.[96] However, it added that reviewing criminal procedure in this area 'would provide the opportunity to *tailor these powers*' to the criminal context.[97] The Commission's consultation proposals indicated that it regarded CMPs as now an established fact and form of procedure and, more importantly, suggest it saw no need to consider reasons why they might not be appropriate and adaptable to a broader range of circumstances. The report maintains this position, observing that CMPs may be used in SIAC and under Terrorism Prevention and Investigation Measures (TPIMs) proceedings, but does not engage with those developments as either problematic or as expansions of secrecy.[98]

The consultation proposals exemplified the way that approaches from one area of national security could be extended to another without full consideration of the implications. In the report, the treatment of the responses regarding adapting civil law to criminal needs is cursory; the report recites competing strands of evidence for and against need for a review to consider adaptation but engages with neither. The recommendation for a review is ultimately an

94 Law Commission, *Consultation Paper* n 6 above, para [5.41]. Law Commission Report n 7 above, para [7.65]; see also paras [7.63] and [7.88] where the Commission states that the 'primary focus' is to be on the administration of justice, though it is not clear whether that means open justice (noting also an apparent typo in the reference to Recommendation 24, as it appears clearly to be a reference to the text of Recommendation 29).

95 Law Commission Report *ibid*, para [7.65].

96 Law Commission, Consultation Paper, n 6 above, para [5.53]; Law Commission Report *ibid*, para [7.83].

97 Law Commission, *Consultation Paper ibid*, para [5.59], emphasis added.

98 Law Commission Report n 7 above, para [7.87].

assertion made regardless of evidence rather than because of it.[99] It is not an answer to say the matter is 'not strictly within our terms of reference'; if a recommendation is made – and it was – then that should oblige the Commission to engage with the critiques in the evidence.[100] In failing to do so it neglects the conflation of the ways in which secrecy is managed in *Incedal* and CMPs. It places them on a single scale for managing secrecy and security, with the result that exceptionalism in criminal and civil law are uncritically combined on a single legal landscape. This is problematic because they are fundamentally different. In *Incedal* the criminal defendant could hear the evidence relied on by the state, but in CMPs the non-state party may be denied access to evidence relied on by the state. This has consequences for transparency and accountability because taking the civil provisions and principles into criminal cases will further and systematically diminish the ability to scrutinise executive behaviour. The Commission viewed one of the factors in the balance as being upholding the principle of open justice but this is misguided; the JSA is not concerned with open justice, it dispenses with it.[101] The legislature rejected the 'open' administration of justice as a criterion and the JSA refers instead to the 'effective' administration of justice.[102] In the *Incedal* approach, open justice is severely contracted but equality of arms remains insofar as the defendant is able to hear the evidence relied on by the prosecution, and the possibility of some media scrutiny is retained.[103] CMPs, however, have stronger limits on open justice and equality of arms. Even if one accepts that the Commission was cautious in taking no substantive view about adapting the civil provisions for criminal cases, the very fact that this appeared an untroubling option in the consultation stage suggests a disturbing sanguinity to undermining rights and protections in the criminal process. That speaks to the lack of consideration given to the wider national security legal framework, which is characterised by concessions to executive control and systemic weaknesses in accountability mechanisms, and the failure to identify persistent exceptionalism as the context in which its reform proposals are made and which they would bolster.

The changes in criminal and civil proceedings plainly raise concerns for accountability. They take place against a backdrop in which national security exceptionalism facilitates the transposition of rules dealing with a specific issue to a broader range of applications. The judicial role has not been exempt from these trends and warrants particular attention.

99 *ibid*, paras [7.90]-[7.100].

100 By way of disclosure, parts of our own evidence was among one strand cited by the Commission in its report: *ibid*, paras [7.94]-[7.95].

101 Law Commission, *Consultation Paper* n 6 above, para [5.52]. It retained this view in the report: *ibid*, para [7.83]. The report cites our statement that the JSA dispenses with open justice (para [7.95]) but does not engage with that.

102 Justice and Security Act 2013, s 6(5). Moves to incorporate open justice considerations into the Bill, after inclusion at Lords committee stage, were later defeated: HL Deb vol 740 col 1812-1860 21 November 2012; Public Bill Committee Proceedings, 5 February 2013, Amendment 55; Hansard HC Deb vol 559 col 685-752 4 March 2013.

103 The *Incedal* approach could, however, present other implications for access to justice. This was contended in *Wang Yam* n 89 above, in which the appellant (unsuccessfully) argued, under Article 34 ECHR, that he should be permitted to refer to *in camera* material relating to his defence in his application to the European Court of Human Rights.

JUDICIAL COMMISSIONERS: THE BLURRED BOUNDARY OF REGULATORY AND JUDICIAL OVERSIGHT

Executive accountability has long been viewed in terms of the relationships between the three branches of government but with the passage of the IPA 2016 – and arguably a partial attempt to respond to the oversight failures surrounding the use of section 94 directions – there has been a blurring of executive and judicial boundaries in the creation of 'judicial commissioners' to provide oversight of the SIAs.

The absence of bright lines of judicial power is not always problematic. On the contrary, a flexible deployment of judges may increase public confidence in scrutiny of matters and might even be 'incontestably to the benefit of good government'.[104] However, attention to the nature of and rationales for judicial roles – more sharply separated from other branches of government since the Constitutional Reform Act 2005 – helps illuminate the constitutional framework and the ways in which integrity and accountability are ensured. With national security exceptionalism pervading institutions and mechanisms so as to limit accountability to parliament, the blurring of judicial and executive boundaries is troubling and significant.

The judicial function

In the UK there is no circumscription of judicial power that is found in other common law jurisdictions.[105] Nevertheless, the archetypal function of judges is to interpret and apply the law in the resolution of disputes. Judges are valued for their skills in analysing evidence, managing parties' interests and making determinations, but also because judicial independence gives rise to confidence that conclusions will be based on evidence, rather than political or other needs.[106] Institutional and individual independence ensures that decisions will be made without influence and visible independence from other branches of government safeguards confidence in the legal system. There are, however, well established departures from that view of the judicial role, some of which arise and function effectively precisely because the judiciary is independent, and because that independence is respected and valued by the executive and legislature.

104 *Wilson* v *Minister for Aboriginal and Torres Strait Islander Affairs* [1996] HCA 18 at [30] *per* Kirby J, dissenting; for a critique of the public confidence rationale, see E. Handsley, 'Public confidence in the judiciary: A red herring for the separation of judicial power' (1998) 20 *Sydney Law Review* 183.

105 *Mistretta* v *United States* 488 US 361 (1989), 407; *Wilson* v *Minister for Aboriginal and Torres Strait Islander Affairs ibid* at [25] *per* Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ; *Grollo* v *Palmer* (1995) 184 CLR 348, 365 *per* Brennan CJ, Deane, Dawson and Toohey JJ; *R* v *Kirby ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Hilton* v *Wells* (1985) 157 CLR 57; F. Wheeler, 'The use of federal judges to discharge executive functions' (1996) 11 *Australian Institute of Administrative Law Forum* 1; P. Emerton and H.P. Lee, 'Judges and non-judicial functions in Australia' in H.P. Lee (ed), *Judiciaries in Comparative Perspective* (New York, NY: CUP, 2011).

106 Select Committee on Public Administration, *Government by Inquiry* Vol 1, HC 51-1 (2004).

Among these departures is the appointment of judges to conduct inquiries into issues of public importance. There has long been concern that such appointments do not sit well with the judicial role, but it is now well-established practice.[107] While the view has traditionally been that appointments of judges to inquiries are not an exercise of the judicial function, one former Lord Chief Justice considered 'the provision of a suitably qualified judge to conduct an inquiry [is] an important part of the duties of the judiciary … [and] an important part of our constitutional framework.'[108] A corollary of this is that 'general constitutional principles concerning judicial independence must apply.'[109] This has practical consequences; for example, the Lord Chief Justice must consent to a judge chairing and a judge cannot be questioned by parliament.[110]

At what point, however, do judges cease to exercise an adjudicatory (or where relevant, independent inquiry) function and become closer to the role of systemic reviewer or even decision-maker within the administrative state?[111] While inquiries might be seen as part of public administration their *ad hoc* nature means they do not form part of a regulatory structure.[112] The independence of regulators and judges is quite different: regulators derive their independence from statute, whereas judicial independence is constitutional. The nature of judicial commissioners' independence under the IPA 2016 is unclear and, as a consequence, the extent to which they are distinct from the executive and can hold the executive to account requires consideration.

The Investigatory Powers Act: a changing judicial role?

The patchwork of commissioners overseeing aspects of surveillance each uses an oversight model that is regulatory (in the sense described above) but which is reliant on judicial independence.[113] The established nature of these positions distinguishes them from the *ad hoc* posts created for inquiries, making them more like independent regulatory authorities. These commissioners reviewed, but did not approve, the work of the SIAs and the exercise of surveillance powers. Unlike many regulators, however, the Commissioners were not selected for

107 S. Sedley, 'Public Inquiries: A Cure or a Disease?' (1989) 52 MLR 469; J. Beatson, 'Should judges conduct inquiries' (2005) 121 LQR 221; Select Committee on Public Administration, *ibid*, esp ch 3.

108 Lord Thomas of Cwmgiedd, 'The future of public inquiries' [2015] *Public Law* 225, 234-235.

109 *ibid*, 234.

110 *ibid*, 235.

111 For example *Wilson* v *Minister for Aboriginal and Torres Strait Islander Affairs* n 104 above.

112 Regulators form part of the executive branch of government having the responsibility for implementation and oversight of policy, mainly against private actors, sometimes having a quasi-judicial function in the determination of breach of rules (whether as a result of the regulator's investigation or as a result of complaints by third parties), and will generally be independent. That independence cannot easily be overridden even on the grounds of national security: *R (on the application of VIP Communications Ltd)* v *Secretary of State for the Home Department and the Office of Communications* [2019] EWHC 994 (Admin) on the interpretation of Communications Act 2003, s 5.

113 There is a contrast here with commissioners established under the Protection of Freedoms Act 2012; they are not required to be judges but they are not focussed on oversight of SIAs.

technocratic expertise but instead because of their independence, with appointments typically being retired senior judges. Arguably, their incorporation into the service of the executive had little impact on judicial independence as they no longer carried out judicial roles.

Building on these models, the IPA 2016 further obfuscates the boundaries of the judicial role by creating 'judicial commissioners' to provide oversight of the exercise of investigatory powers, and specifically to participate in the approval of warrants.[114] The IPA 2016 established the Investigatory Powers Commissioner (IPC) and the Investigatory Powers Commissioner's Office (IPCO), replacing the existing commissioners and their offices. The IPA 2016 continues the established Commissioner model, as the IPC must be a person who 'holds or has held a high judicial office', as must any other commissioners supporting the IPC.[115] However, the IPA 2016 creation of judicial commissioners marks a new and very important part of the judicial role for two reasons. The first builds on traditional features, but the second is a radical departure.

First, the model aspires to be more significantly underpinned by judicial independence than its predecessors. This is evident in three ways: from the process for appointment and removal, the standing of the office's inaugural occupant, and the scale of the operation. This underpinning is valuable and largely consistent with traditional conceptions of the judicial role and independence. The Prime Minister appoints the IPC and Commissioners for three-year renewable terms but they must be jointly recommended by the heads of the judiciary of England and Wales, Scotland and Northern Ireland, and by the Lord Chancellor.[116] Removal requires a resolution of both Houses of Parliament.[117] While the Prime Minister's powers are limited and the process suggests a robust respect for judicial independence, concerns were raised while the Bill was in draft.[118] Even if the Prime Minister in reality has little to do with the appointment,[119] it is questionable whether, as required by Convention jurisprudence,[120] a Judicial Commissioner is perceived as independent. Turning to the scale of the operation, resources will inevitably be at issue because a key element of independence is adequate funding. As the outgoing IoCC observed, 'The appearance of independence is undermined if one has to go through the minister whose work one is supervising.'[121] Very substantial resources have, however, been committed to IPCO, with over 50 staff and 15 commissioners. Thus, in form, substance

114 We note that the Biometrics Commissioner, who need not be a judge, may make decisions about retention and use in individual cases but not about warrants: Protection of Freedoms Act 2012, s 20.

115 Investigatory Powers Act 2016, s 227(2).

116 Investigatory Powers Act 2016, s 227(3)-(4), 228(2)-(3).

117 Investigatory Powers Act 2016, s 228(4).

118 *Report of the Joint Committee on the Draft Investigatory Powers Bill* HL 93, HC 651 (11 February 2016), paras [594]-[597]; the removal proposals were strengthened after the Joint Committee reported.

119 Lord Judge, *Oral Evidence to the Joint Committee on the Investigatory Powers Bill* HC 651 (2 December 2015), Q 59 at https://www.parliament.uk/documents/joint-committees/draft-investigatory-powers-bill/oral-evidence-draft-investigatory-powers-committee.pdf; see also *Report of the Joint Committee on the Investigatory Powers Bill* , *ibid*, paras [580]-[588].

120 *Zakharov* v *Russia* [2015] ECHR 1065, [257]-[260].

121 Sir Stanley Burnton, *Oral Evidence to the Joint Committee on the Investigatory Powers Bill* n 119 above, Q 57.

and scale, the establishment of the IPC and IPCO constitutes a significant and new departure from the established conceptualisation of the judicial role in a way that earlier Commissioner models did not. It relies on core components of institutional and individual independence, most notably where warrants do not require judicial approval but are subjected to a so-called 'double lock' that for its legitimacy and effectiveness relies on judicial independence more than judicial power. That independence is weaker with three-year terms, but there is a measure of protection insofar as a judicial commissioner is unlikely to be removed for political reasons. Most importantly, the extent to which judicial commissioners have the independence of judges is necessary (though not of itself sufficient) for effective oversight of executive action. In constitutional terms, the regime has the hallmarks Lord Thomas saw in the judicial chairing of public inquiries: 'the provision of a suitably qualified judge … [is] an important part of the duties of the judiciary … and an important part of our constitutional framework.'[122] That is a strength, but it is one that simultaneously carries risks because of the positioning and limits of commissioners' powers in an oversight model with constraints on public reporting

Secondly, and radically, the role of judicial commissioners under the IPA 2016 is extensive in scope, which puts more stress on the established conceptions of judicial independence and separation of powers than would occur if it was narrow in scope, and thus makes the blurred boundary particularly significant. Commissioners' responsibilities are wide, wider than those of the commissioners under RIPA 2000, covering numerous aspects of surveillance approval and oversight.[123] In deciding whether or not to approve a warrant, a commissioner must review the executive conclusions about whether it is necessary on relevant grounds, and whether the conduct the warrant authorises is proportionate to the objective of the warrant. The Commissioner is to 'apply the same principles as would be applied by a court on an application for judicial review.'[124] There is also a general limitation that judicial commissioners should have regard to privacy rights.[125] However, these processes are not the same as those that ordinarily characterise judicial review or even proceedings that use CMPs.

There are limits to how effective the judicial commissioner model can be as a regime that holds the executive to account. Commissioners are exercising an oversight function from *within* the Executive. This is apparent in several ways. The model is quite different from that envisioned in the original recommendations of the Independent Reviewer of Terrorism Legislation, which were that in most instances the Secretary of State should apply for a warrant and a judge should decide whether to authorise it.[126] Commissioners must always

122 Lord Thomas of Cwmgiedd, n 108 above, 234-235.

123 Investigatory Powers Act 2016, ss 23, 77, 89, 108, 140, 159, 179, 208, 252-254. They include approving warrants issued by the executive for interception, identification or confirmation of journalistic sources, retention of communications data, equipment interference, bulk interception and acquisition, bulk personal datasets, and general 'national security notices' that require a telecommunications operator to 'take such specified steps as the Secretary of State considers necessary in the interests of national security'.

124 For example Investigatory Powers Act 2016, s 23.

125 Investigatory Powers Act 2016, s 2.

126 Anderson, n 21 above, [14.47]-[14.57].

have regard to national security as the prime consideration.[127] Other matters – including privacy, necessity and proportionality – must also be considered[128] but executive views about national security and the particular context will inevitably carry exceptional weight and demand deference. In its wider oversight functions of audit, inspection and investigation the IPC is expressly limited by section 229(6) under which he 'must not act in a way [he considers to be] contrary to the public interest or prejudicial to (a) national security, (b) the prevention or detection of serious crime, or (c) the economic well-being of the United Kingdom'.[129] Moreover, Judicial Commissioners will not hear *inter partes* arguments.[130] Without adversarial challenge or at least a special advocate (however problematic the latter may be), the Commissioner must both identify the arguments that a person affected might put, and judge those arguments.

The IPA 2016 has resulted in a comprehensive, centralised system that takes the judicial role – and sitting judges – if not into the executive, then beyond and outside the traditional conceptions of the judiciary. This move relies on an independent judiciary and a clear separation of powers, yet simultaneously risks compromising them. The IPC has stated that 'Judicial Commissioners will act totally independently of government,'[131] but the IPA 2016 limits the powers of review and requires deference to ministerial judgment on national security decision-making. While individual and institutional independence of Commissioners approaches what might be expected of the constitutional protections for the judiciary, the limits of oversight powers and the approval of executive actions (rather than judicial authorisation on application) seem to align more closely with oversight positioned within the executive. There are other, fundamental ways Judicial Commissioners do not act as the judiciary. They are not conducting a judicial review of executive action (and so appear to be acting as a part of the executive, albeit with an oversight function) and cannot keep under review the exercise of any function by a judicial authority[132] (and such a limit would also be characteristic of an executive function). The shift from a sitting judge being IPC to a retired judge (as with the earlier commissioners) is also significant: it reduces the constitutional and institutional conflict but the power and independence of a sitting judge may make for more effective accountability. It is too soon to tell whether this is a harbinger of more permanent change.

In the end, the constitutional location of Judicial Commissioners is ambiguous. There is much to be said for the role of Judicial Commissioners being set out explicitly in statute, and for an oversight mechanism respecting judicial independence. However, the development of Judicial Commissioners with a broad and expanding[133] range of responsibilities in relatively short time

127 For example Investigatory Powers Act 2016, ss 2(4), 23(2) and its references to ss 2, 20, 21.
128 Investigatory Powers Act 2016, s 2.
129 Investigatory Powers Act 2016, s 227 (definitions), s 229, esp s 229(6); Explanatory notes, 'Commentary on provisions of the Act', para [640].
130 Lord Pannick QC, 'Safeguards provide a fair balance on surveillance powers' *The Times* 12 November 2015.
131 IPCO Press release, 18 October 2017 at https://www.ipco.org.uk/docs/JC%20Announcement%2020171018.pdf
132 Investigatory Powers Act 2016, s 229(4).
133 IPCO now has responsibility for the Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Re-

represents a fixture on the constitutional landscape that affects the institutional role of the judiciary and blurs the boundary between executive and judicial functions. There is a stark contrast with the role of judges conducting inquiries: whereas that was viewed as a departure for at least a century prior to Lord Thomas' position that it is a part of the judicial role, the role of judges as commissioners has occurred in far quicker time and with far less controversy. Against this background, the Law Commission proposals can be seen clearly as an acceptance, without remark, of this new system.

Building on the IPA 2016 foundations: the Law Commission proposals

The Law Commission adopted the IPA 2016 judicial commissioner model as a cure for all ills. It proposed and then recommended a new statutory commissioner to address serious concerns of current or former SIA staff. It did so without considering the specific purpose for which the IPA 2016 was brought into being, nor the many debates and concerns at the time, or the fact that much of European jurisprudence expresses a preference for judicial oversight of surveillance through the courts. The Commission is, however, at its best where the report recommends a public interest disclosure defence for whistleblowers to 'fortify' the statutory commissioner role.[134] Engaging with the evidence it notes that the aim is not merely Article 10 compliance, but 'a fair law that takes seriously the public interests in national security and in accountable Government'.[135] Our concern nonetheless remains that adopting the judicial commissioner model in new circumstances recognises neither the difficulties with the model nor the way it shifts still further from the now well-accepted role of judges conducting inquiries. These unexamined structural matters are not remedied by a public interest disclosure defence.

What can be seen in the emergence of the judicial commissioner model as established by the IPA 2016 is an expansion of the judicial role, with judges exercising power over the executive, but not clearly from outside the executive branch of government. This is not necessarily an insurmountable problem, especially as the model – at least in the IPA 2016 framework – substantially respects judicial independence both in form and substance. What is a problem, however, is that this shift has occurred without a discussion or acknowledgment of the changed constitutional role, especially if this changed role covers wider ground. Judicial commissioners have become actors with a general and ever-expanding remit, yet an ill-defined place in the constitution. The Law Commission proposals are an indicator of the extent to which the new judicial commissioner role is viewed as a go-to panacea for the executive's security

ceipt of Intelligence Relating to Detainees, and oversight over UK-US Data Access Agreement, but is not involved in approving requests: The Functions of the Investigatory Powers Commissioner (Oversight of the Data Access Agreement between the United Kingdom and the United States of America and of functions exercisable under the Crime (Overseas Production Orders) Act 2019) Regulations 2020 (draft at the time of writing).

134 Law Commission Report n 7 above, paras [8.66]-[8.128].

135 *ibid*, para [8.127].

needs. That trend is worrying. An examination of the practical and constitutional concerns would alleviate the risk of such a rush to simplistic adaptation. The constitutional scope and limits of the judicial role in this area need to be articulated; uncertainty and ambiguity here are undesirable because of the risk of retreat from modern accountability benchmarks.

CONCLUSION

The context for this article is the constitutional tensions between executive accountability for actions done for national security reasons, the transparency and information flow required to facilitate executive accountability, and the public interest in protecting national security, which may require some secrecy. We have noted a series of statutes – particularly those putting the SIAs on a statutory footing – which have constrained the scope and exercise of prerogative power. The move towards some parliamentary control in this area is to be welcomed. The result of the changes, however, is not the normal application of constitutional principles but instead sees the use of special frameworks and approaches that privilege executive control and secrecy, with a lack of transparency. This exceptionalism occurs across the institutions of the state. It is apparent in the national security exception in section 94, in the executive controls over reporting to parliament and in its influence over the ISC. The principles of open justice have been diluted in both civil and criminal cases and 'extra-statutory' regimes have been developed and expanded. While the IPC as a quasi-regulator (the status of which in itself raises constitutional questions) oversees the SIAs, the actions of those overseen are never fully brought into the light. The IPC and judicial commissioner roles were established in response to a lack of effective controls over surveillance but are at risk of being treated as the solution for all national security challenges without consideration of the implications of taking that path.

Whether or not each of the examples considered constitutes an appropriate balance between the needs of national security and principles of control and accountability is an important question, but our concern is different. It relates to the use of existing compromises and exceptions in new situations and the way that exceptional solutions are then applied in contexts broader than originally envisaged or for which they were designed, especially in the light of new technologies or new threats. Such application is not automatically wrong; indeed, we accept that the consideration of existing models for balancing competing interests is a practical starting point for the resolution of conflicting imperatives. Nonetheless, we consider that the tendency (as we have demonstrated) has been simply to adopt the model, sometimes in new contexts, without consideration of the systemic consequences. While that may have been forgiveable in individual instances, the scale and scope of deployment means that is no longer the case.

The fact of acceptance and the subsequent re-use of a model is a process through which the exceptions become entrenched. This risks the normalisation of particular models that are premised on indirect accountability and thus the

persistence of exceptionalism, executive control and limited accountability, but utilising parliamentary and judicial mechanisms rather than prerogative powers. Against this background we suggest that when considering existing models as reference points for further reform, both the weakness and the strengths of these models should be considered, as well as the context in which they have operated.

Individual compromises should not be seen in isolation. The acceptability of exceptionalism in one area is informed by its acceptability in others. Taken together, they may have a significant impact on our understanding of the constitution, effectively re-asserting the specialness of national security generally, rather than in specific, identified and justified contexts. The individual instances we discuss may be the tip of the iceberg representing a more fundamental change, most notably as regards the mechanisms to ensure executive accountability. The contribution of this article, at least in part, has been to demonstrate the extent to which techniques to address concerns in one context have been redeployed despite significant concerns about their operation which have not been resolved.

Viewed through that prism, a key issue is the need to distinguish between oversight, accountability and transparency. It becomes apparent that in national security matters accountability is not based on transparency with information open to all (in principle), but instead relies on oversight regimes where what might be called a 'trusted intermediary' is provided with some information, but is constrained on how it may use or disclose that information. Oversight operates on the basis that someone sees, but that is a form of accountability which is more limited and in which the ability to sanction (in many respects generally weak) is weaker still; these limitations tend not to be discussed. Our concern is that executive accountability becomes diluted in ways that give the misleading appearance of accountability. Moreover the danger of disregarding the cumulative effect of these changes is that there will be a temptation – when faced with new challenges whether within the security field or not – to replicate these models without reflection and that with that replication comes the risk of an irreversible shift in the constitutional balance.